No. 89-1510

In The

Supreme Court of the United States

October Term, 1989

CAROL ANNE KLEEMANN, et al.,

Petitioners,

vs.

McDONNELL DOUGLAS CORPORATION,

Respondent.

PETITIONERS' REPLY BRIEF

ROBERT S. COOPER, JR.
LAW OFFICES OF ROBERT S. COOPER, JR.
Counsel for Carol Anne Kleemann, et al, Petitioners,
Woodstock, Route 14
Post Office Box 190
Port Haywood, Virginia 23138
(804) 725-9207 / 725-3937

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

I.

QUESTIONS PRESENTED FOR REVIEW

1. Is a design defect in military equipment, resulting solely from contractor negligence, thereby concealed from the Government, rejected when discovered, subject to the *Boyle* government contractor defense?

2. Is conflict between the application of state law and a significant government interest or policy as defined in *Boyle* a prerequisite to the application of the *Boyle* government contractor defense?

3. Did the Court of Appeals err in defining the first two elements of the *Boyle* defense, thereby finding Navy approval and product conformity when approval is legally precluded and the design feature in question was condemned by the Navy for non-conformity?

4. Does the *Boyle* government contractor defense, when raised by Motion for Summary Judgment require that Plaintiff prove non-conformity to the government approved specifications?

5. Did the Fourth Circuit err in disregarding mandatory statutory and binding authority in its affirmance of summary judgment pursuant to F.R.C.P. 56?

II.

LIST OF PARTIES

Petitioners/Appellants/Cross-Appellees/Plaintiffs

- CAROL ANNE KLEEMANN, As Surviving Spouse of Captain Henry M. Kleemann And Personal Representative Of His Estate
- KATHERINE M. KLEEMANN, Minor Child Of Captain And Mrs. Kleemann
- MICHAEL ANDREW KLEEMANN, Minor Child Of Captain And Mrs. Kleemann
- SUSAN E. SEIDEN, Major Child of Mrs. Kleemann And Step-Child Of Captain Kleemann
- STEVEN S. S. SEIDEN, JR., Major Child of Mrs. Kleemann And Step-Child Of Captain Kleemann

Respondent/Appellee/Cross-Appellant/Defendant

- McDONNELL DOUGLAS CORPORATION

III.

TABLE OF CONTENTS

IV.

TABLE OF AUTHORITIES

Page

U.S. SUPREME COURT CASES:

U.S. COURT OF APPEALS CASES:

TABLE OF AUTHORITIES – Continued

No. 89-1510

In The

Supreme Court of the United States

October Term, 1989

CAROL ANNE KLEEMANN, et al.,

Petitioners,

vs.

McDONNELL DOUGLAS CORPORATION,

Respondent.

PETITIONERS' REPLY BRIEF

Petitioners, Carol Anne Kleemann, etc., et al, Susan E. Seiden and Steven S. S. Seiden, Jr., file this brief in reply to McDonnell Douglas Corporation's Brief in Opposition, and again ask that their Petition for Writ of Certiorari be granted.

INTRODUCTION

Counsel for the Petitioners was served with McDonnell Douglas Corporation's Brief in Opposition on April 28, 1990. The Petition is now under submission to the Court and is scheduled for conference on May 17, 1990. Carol Anne Kleemann, etc., et al, Susan E. Seiden and Steven S. S. Seiden, Jr., ask that this reply be considered with the documents under submission.

In its Brief in Opposition, McDonnell Douglas has, in the main, ignored the issues presented in Plaintiffs' Petition, and glossed over others, which requires a reply. See

Sup.Ct. R. 15.6 Carol Anne Kleemann, Susan E. Seiden and Steven S. S. Seiden, Jr., now reply.

ARGUMENT IN REPLY

ERRORS CONTAINED IN RESPONDENT'S STATEMENT OF THE CASE

At the outset Respondent stated Petitioners allege the landing gear in question failed to meet "a procurement objective of a 'fail safe' design", and "At no time . . . asserted that the landing gear did not comply with the then-applicable design and engineering specifications or drawings that had been approved by the government."[1] This is simply incorrect. Plaintiffs alleged the design breached the Navy's contractually imposed design requirements, the reasonably precise specifications defined in the case law,[2] the quantitative design requirements (335-336; 523-537)[3] and requirements on the engineering drawings themselves. (533-534).

The former were based on the Navy's determination (260-261) and Petitioners' experts' opinions (343-351); the latter were based on testimony of MDC engineers. (Pet.App. 1 & J).

ALLEGED BACKGROUND

In its recitation of the "Background", Respondent claims "the Navy required the design of the main landing gear to incorporate a mechanism and geometry" . . . which "required the wheel to deplane".

---

[1] Respondent's Brief in Opposition p.1.

[2] See e.g. *Ramey v. Martin Baker*, 656 F.Supp. 985, 994-995 (D.Md.1987) Aff'd. 874 F.2d 946 (4th Cir. 1989).

[3] Numbers in parentheses refer to the Appendix filed in the Court of Appeals. The Appendix to the Petition for Certiorari filed in this Court will be cited "Pet.App. ___".

This is less than accurate. While the levered gear was selected by MDC to satisfy stability and weapons stowage requirements (390-393), the planing mechanism was needed to get the gear to fit within the space allotted for the wheel well. (Eng.Rpt.R77-65 at 491). There is no evidence that the size of the wheel well was related to weapons location or that the Navy required retention of the YF-17's wheel well in the F/A-18 or a wheel that planed.

Other allegations are similarly flawed. There is no evidence that the Navy exercise any discretion over the design of the relevant aspect of the landing gear. The evidence is that C.P.C. designed it, period. (Pet.App. H-1, I-3).

MDC is still claiming the Navy rejected a proposal in 1983 to redesign the planing link even though its retired Unit Chief of F/A-18 landing gear design denied it was even made! (Compare Respondent's Brief p.3 with Pet.App. H).

When the Navy compelled MDC to redesign the gear's hydraulic system in 1983 to bring it within design requirements, Respondent claims the Navy was requiring "MDC to modify the design" rather than remedy a defective aspect of the design. (Compare Respondent's Brief p.4 with 248).

PROCEEDINGS IN THE COURTS BELOW

Respondent has presented an incomplete version of the actions of the lower courts.

The Magistrate, after noting the case law gave little assistance in determining what the relevant specifications were (Pet.App. C-2), ignored *Ramey v. Martin Baker,* 656 F.Supp. 984 (D.Md. 1987),[4] which had defined the relevant specifications for another subcontractor-furnished component of the F/A-18; rejected Plaintiffs' specification

---

[4] The Magistrate was aware of *Ramey* because it was cited for other purposes in a Footnote (Pet.App. C-3 N.2).

contentions because they were not Type 1 specifications per *Shaw v. Grumman Aerospace*, 778 F.2d 736 (11th Cir. 1986), (Pet.App. C-6,7); and then defined the relevant specifications in terms of IAFC-40A ("Here, that [the approved reasonably precise specification] is IAFC-40A"). (Pet.App. C-5).

IAFC-40A is a maintenance message concerning installation of hydraulic restrictors in fleet aircraft which was never applicable to the aircraft. (607-618). Plaintiffs filed supplemental affidavits to that effect. (600-606; 619-636).

On appeal, the district court held the Magistrate found that the relevant specifications were the "ultimate design specifications and/or the ultimate quantitative design specifications" (Pet.App. B-2,3,4). Next, it imposed the burden of proving a material deviation therefrom on the Plaintiffs, after making it impossible to do so by holding that "procurement specifications do not constitute reasonably precise specifications." (Pet.App. B-3).[5]

Plaintiffs filed a Motion for Reconsideration submitting the recently obtained testimony of Mr. Dennis Gendreau, Respondent's specification expert, that the quantitative specifications for the landing gear were contained "mostly in the procurement specification." (Vol.4, R.80; See Pet.App. J-1, first five lines). The motion was denied without comment. (Rec. Vol.4, R.82). On appeal the Fourth Circuit, without commenting on these irregularities, delivered its *de novo* opinion, affirming summary dismissal of Petitioners' suit.

ALLEGED FAILURE TO RAISE ISSUES

Respondent avoids many of the arguments raised by Petitioners by claiming that they were not raised timely below. This is simply incorrect.

---

[5] Somehow the specifications in *Ramey*, which were sufficiently precise when relied upon by a defendant became "precatory" when relied upon by Plaintiffs. (Pet.App. B-3).

The Court of Appeals opinion raised the Constitutional issues by finding "approval" *sua sponte*. Thus, these issues are properly raised before this Court. See *Andrus v. Charleston Co.*, 436 U.S. 604, 609 (1978); *Church of Scientology of Cal. v. I.R.S.*, 484 U.S. 9 (1987).

Petitioners raised all other issues on the way from the Magistrate to the District Court or in the District Court and on to the Court of Appeals save those which were raised for the first time by the latter's opinion. There has been no waiver. (See Vol.2, R.48; Vol.3, R.68; Vol.3, R.70; Vol.3, R.78; Vol.4, R.80; Vol.4, R.99; and Appellants' Briefs to the Fourth Circuit Court of Appeals).

ALLEGED REASONS FOR DENYING THE WRIT

Respondent claims that "the instant case presents nothing more than the straight forward application of *Boyle* to a paradigmatic military procurement effort and provides no basis for the exercise of this Court's discretionary review function." (Respondent's Brief p.7).

What Respondent overlooks is the issue of what Court will establish the criteria for this defense. It is going to be based on the "discretionary function exception" of the F.T.C.A. 28 U.S.C. § 2860(a) set out by this Court in *Boyle v. U.T.C.*, 487 U.S. 500 (1988), or "the nature of the product" and the "characteristics of the design process" set out by the panel in *Kleemann v. McDonnell Douglas Corporation*, 890 F.2d 690 (4th Cir. 1989)? (Pet.App. A-4).

Boyle makes clear that an otherwise negligent design feature of military equipment may be approved by the government if it represents a choice made by the government for valid reasons of public policy. Such approval will immunize a contractor designing and/or furnishing such equipment to the government from civil liability therefor under state law. However, *Boyle* makes it equally clear that if the design feature in question results solely from contractor fault, negligence, incompetence, indifference or the like, it cannot be "approved". *Berkovitz v.*

United States, 486 U.S. 531 (1988); *Indian Towing Co. v. The United States*, 350 U.S. 61 (1955).

Thus, *Boyle* precludes application of the defense to this case because a design based solely on contractor or subcontractor negligence or fault is simply not subject to a discretionary decision in its favor. *Berkovitz v. United States*, 486 U.S. 531 (1988).

It is also the only appellate decision in the applicable post-*Boyle* military contractor jurisprudence which has unabashedly adopted the Type 1 specifications set out in *Shaw v. Grumman Aerospace*, 778 F.2d 736 (11th Cir. 1988), and held that conformity means only configuration compliance, i.e. proper manufacture.

Respondent's contention that the panel's opinion represents a "fleshing out" of the *Boyle* doctrine, is without merit. What the Fourth Circuit has done is replace *Boyle* with its own variant of the defense. There is no other rational basis for immunizing MDC for a design defect in military equipment, which the government itself has found to be defective, in violation of the government's contractually imposed design requirements, where MDC was compelled to redesign at its cost, and where the government is attempting to compel Defendant to retrofit the fleet at its cost.

THE ALLEGATIONS THAT THE PANEL'S DECISION WAS CORRECT AND IN ACCORD WITH *BOYLE* AND THE DECISIONS OF OTHER CIRCUITS

A. The Underlying Conflict Between State And Federal Interest.

Respondent's contention that this issue was not raised below is incorrect. While the Magistrate utilized the correct conflict analysis (Pet.App. C-7), she misdefined the relevant specifications and erroneously found the requisite conflict.[6] (Pet.App. C-7). This deficiency was

---

[6] The Magistrate defined the specification in terms of the hydraulic restrictors. Query: How can the duty to equip the

(Continued on following page)

brought to the attention of the district court (Vol.4, R.79, Ex.1 at pp.6-7),[7] as well as the Court of Appeals.

The basic problem with Respondent's position is this. Its government contract did not require delivery of F/A-18 aircraft equipped with planing links having inadequate cartridge stroke. Its contract required precisely the opposite. (450). When the Navy discovered what MDC had done, it compelled MDC to redesign the link and deliver aircraft equipped with main landing gear planing links with adequate cartridge stroke. (260-261).

The plain truth is that MDC, in breaching its government contract, is simply not entitled to the benefit of the defense. This was brought to the Magistrate's attention. (Vol.2, R.48, pp.4 & 17).

Regardless of how this legal deficiency is characterized, i.e. an absence of conflict, an identity of contractual and state law legal duties, or an absolute impediment to "approval", this fact precludes application of this defense to this case.

Respondent has never addressed this issue in any of the proceedings below. Nor do we believe it will ever address it unless and until this Court grants a Writ of Certiorari, and directs it to do so. It is the logical and legal reef upon which MDC's arguments run aground.

The essence of the *Boyle* decision is to cloak a military contractor with the same immunity that the government enjoys under the discretionary function exception to the F.T.C.A. No more and no less. If the contractor breaches its contract with regard to the design of the equipment it supplies, it should not be immune from civil liability for the results of such breach.

(Continued from previous page)

airplane with an hydraulic restrictor conflict with state law duty to equip the airplane with a planing link with adequate cartridge stroke?

[7] Plaintiffs, having been denied the right to file a rebuttal memorandum, which contained the argument, with the Magistrate, attached the memorandum to the brief filed in the district court. (Pet.App. B-4)

B. Alleged Approval

Respondent claims this issue is not properly presented for review. MDC overlooks the panel's *sua sponte* finding of approval. (Pet.App. A-6 N.2). Thus, it is properly presented. *Andrus v. Charlestone Stone Products Co.*, 436 U.S. 604 (1978).

Respondent failed to address Petitioners' arguments with regard to the legal impediments to approval posed by *Berkovitz v. United States*, 486 U.S. 531 (1988) and *Indian Towing Co. v. United States*, 350 U.S. 61 (1955). (See Pet. p.13-15).

Respondent relied on "continuous exchange" to supply approval. (Respondent's Brief p.10).

In so doing, Respondent assumed that this design defect is subject to government approval in the first place. It is not. *Trevino v. General Dynamics*, 865 F.2d 1474, 1480-1482, (5th Cir. 1989); *In Re Joint Eastern and Southern District New York Asbestos Litigation (Grispo, et al v. Eagle-Picher Indus., Inc.*, 897 F.2d 626, 630-632 (2nd Cir. 1990); *Nielsen v. George Diamond Vogel Paint Co.*, 892 F.2d 1450, 1454 (9th Cir. 1990).

Thus the existence of "continuous exchange" is simply irrelevant to the issue presented.

Next, rather than addressing the arguments raised by the Navy's inability to evaluate the subcontractor's design choice, Respondent accused Petitioners of "fabricating" a conflict between the panel's conclusion and the Fifth Circuit's analysis in *Trevino*. (Respondent's Brief p.11). This matter was addressed in detail in the Petition at pp.14-15.

There most assuredly is a conflict between the circuits on this issue of approval if the Fourth Circuit's opinion is allowed to stand. *Trevino* requires a substantive review of the contractor's design choices by government personnel competent to do so. *Trevino*, 865 F.2d at 1480-1482. The panel's opinion infers a substantive review of the engineering drawings from the fact that the

contractor was required to submit them to the government, notwithstanding testimony from the defendant that Naval approval of such drawings and other specifications was by acquiescence only. (Pet.App. H-6). If no conflict exists between *Kleemann* and *Trevino* there never will be a conflict between the circuits.

C. The Alleged Reasonably Precise Specifications

For the third time Respondent has declined to discuss the effect of the definition of reasonably precise specifications in terms of *Shaw* Type 1 specifications. (See Plaintiffs' Petition for Writ of Certiorari at pp.15-18). Respondent claims that the restriction of the reasonably precise specifications to "the final detail drawings and engineering analysis" is well settled. This simply not correct. See *Smith v. Xerox*, 866 F.2d at 138 (5th Cir. 1989); *Harduvel v. General Dynamics Corp.*, 878 F.2d 1311, 1320 (11th Cir. 1989); *Ramey v. Martin Baker*, 656 F.Supp. 984, 994-995, (D.Md. 1987) aff'd. 874 F.2d 946 (4th Cir. 1969).

D. Alleged Conformity

Respondent failed to address any of the arguments raised in the petition. Instead it stated "It is undisputed that the landing gear conformed to the quantitative specifications". This is simply not accurate. MDC's expert Mr. Gendreau testified that the quantitative specifications are contained in the Procurement Specification and MDC's engineer Mr. Kirkland testified that C.P.C.'s design violated those specifications. (Pet.App. J & K). Thus it certainly is disputed.

CONCLUSION

Respondent failed to respond to Petitioners' arguments with regard to the panel's opinion replacing the *Boyle* standard with something akin to *Feres*, failed to come to grips with the obvious lack of conflict between state law and defendant's contractual obligations to the

government, declined to discuss why the defense should be made applicable to a contractor whose product breaches the government's contractually imposed design specifications, declined to discuss why and how McDonnell Douglas is entitled to a greater degree of immunity than the United States of America is, failed to address in other than the most superficial manner approval, contenting itself with citing cases involving "continuous back and forth" when that is clearly inapplicable to the design of the facet of the landing gear with which we are involved here, has yet to explain why reasonably precise specifications must be limited to engineering drawings and nonconformity to mismanufacture. Likewise Respondent declined to address Plaintiffs' burden of proof argument and ignored the summary judgment issues which were raised at the outset of its motion and reurged every step along the way.

Despite McDonnell Douglas Corporation's evasion of the arguments and its unsupported claim that there is nothing in this case worthy of this Court's attention, this Petition presents issues of national importance on which the Courts of Appeals are now in dramatic conflict. A definitive resolution of each such conflict will assist litigants and courts in the proper application of the defense and, hopefully, will arrest the tendency of at least one circuit to replace the *Boyle* criteria with its own.

For these reasons Carol Anne Kleemann, etc., et al, Susan E. Seiden and Steven S. S. Seiden, Jr., respectfully pray that their Petition for a Writ of Certiorari be granted.

Respectfully submitted:

Robert S. Cooper, Jr.
Woodstock (Route 14)
Post Office Box 190
Port Haywood, Virginia 23138
(804) 725-9207 or 725-3937